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NO. 206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada, *Petitioner*,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a Corporation, *Respondents*.

On Writ of Certiorari to the Supreme Court of the State of California

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BRIEF FOR PETITIONER

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THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a Corporation, *Respondents*

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BRIEF FOR THE COUNTY OF MINERAL

OPINIONS BELOW

The opinion of the Public Utilities Commission (Govt. R. 6-19)[1] is reported at 50 Cal. P.U.C. 749. The order of the Supreme Court of the State of California denying the writ of review without opinion (R. 38) is reported at 38 Adv. Cal. 323.

[1] "Govt. R. —" refers to the record in No. 205, companion case to this.

JURISDICTION

The Supreme Court of the State of California entered its order denying a writ of review on January 21, 1952 (R. 38). A petition for rehearing, seasonably filed, was denied on February 18, 1952 (R. 46). By order of Mr. Justice Douglas, dated May 1, 1952, the time for filing a petition for a writ of certiorari was extended to and including July 17, 1952 (R. 47). The petition for a writ of certiorari was filed on July 16, 1952, and was granted on October 13, 1952. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The over-all question is whether the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission, over a sale made in California by the California Electric Power Company to Mineral County of electric energy which the County transmits from the point of delivery in California to points in Nevada, for local distribution and sale at retail to Mineral County inhabitants.

Specifically the questions are:

1. Whether an interstate sale to the County is a "sale of electric energy to any person for resale" subject to Federal Power Commission regulation under Sections 201(d) and 205 of Part II of the Federal Power Act, rather than to regulation by the California Commission.

2. Whether Section 20 of Part I of the Power Act authorizes states to regulate an interstate wholesale rate of a Part I licensee so as to preclude Federal Power Commission regulation under Section 205 of Part II and, if so, whether the Nevada Public Service Commission is a "properly constituted" authority to fix such a rate by agreement with the California Public Utilities Commission within the meaning of Section 20.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copies of the Act which are being lodged with the Clerk for the convenience of the Court. Pertinent provisions of the Nevada statutes relating to petitioner are set forth in the Appendix, *infra*, pp. 13-17.

STATEMENT

Conflicting Commission Orders Affirmed by Different Courts. The identical orders of the Supreme Court of the State of California under review here and in No. 205 were entered in companion proceedings in that court (R. 38, Govt. R. 68). By those orders the County of Mineral, Nevada, and the United States were severally denied the review they sought of the order of the California Commission issued July 3, 1951 (Govt. R. 19), asserting regulatory jurisdiction over the rates which California Electric Power Company charges for electric energy sold and delivered to Mineral County and to the Navy Department, respectively (Govt. R. 19).

The California Commission's order was issued in conflict with an earlier order of the Federal Power Commission (Govt. R. 40-41) in which the Federal Commission had asserted regulatory jurisdiction over the same rate.[2] Both

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[2] The conflict is clearly shown by comparison of the orders. The Federal Commission's order, issued April 13, 1951, directed the Company, *inter alia*, to "cease and desist from charging Mineral County Power System any rates and charges other than those reflected in filed Rate Schedule FPC No. 15, until and unless such schedule is duly superseded by a properly supported new filing or by a rate prescribed by Commission order" (Govt. R. 40-41).

The California Commission on July 3, 1951, ordered that the Company, *inter alia*, "is hereby * * * directed to charge and collect from Mineral County Power System * * * the rates prescribed for such service by Decision No. 41798, viz., the rates set forth in Schedule P-3 attached to such decision" (Govt. R. 19).

Use of that P-3 rate instead of the FPC No. 15 increased the charges to petitioner approximately 43 percent, or $15,372.11 over a sixteen months' period, according to a finding of the Federal Commission which has not been questioned (Govt. R. 27).

See *infra*, pp. 7-8.

Commissions' orders were based upon the same record, a concurrent hearing[3] having been held by the two Commissions on the jurisdictional issues (Govt. R. 7, 10-11, 28).

The Federal Commission's order was affirmed on review by the Ninth Circuit on October 14, 1952, and rehearing denied November 12, 1952.[4] Mandate was stayed until December 22, 1952, to permit the filing in this Court of a petition for certiorari, and the petition was filed December 11, 1952. No. 495, this Term. The California Commission, respondent herein, had submitted a brief and participated in the oral argument before the Ninth Circuit as *amicus curiae*. No. 495, III R. 655.

Petitioner, Its Facilities and Operations. Petitioner herein, the County of Mineral, a political subdivision of the State of Nevada, owns and operates an electric utility system under the name of Mineral County Power System. The Board of County Commissioners is *ex officio* the Board of Managers of the System, and County officers, including the District Attorney, serve *ex officio* for the System. Nev. Stats. 1921, p. 80; 1923, p. 366; 1925, pp. 55-56, 58-60; 1945, pp. 332-333. Pertinent portions of these statutes are reproduced in the Appendix, *infra*, p. 13-17.

The Mineral County Power System owns and operates transmission and local distribution facilities by which petitioner receives delivery of electric energy from respondent, California Electric Power Company, at the latter's Mill Creek plant in California; transmits the energy into Nevada; and there locally distributes and sells it at retail to 823 customers in Hawthorne, Luning, Mina, Sodaville, and other points, all in Mineral County. Petitioner transmits energy over its transmission facilities approximately 50 miles to Hawthorne, Nevada, crossing the state boundary about midway; thence 26 miles to Luning; thence 8

[3] Concurrent hearings with state commissions are provided for by the Federal Power Commission's rules. 18 C. F. R. § 1.37(e).

[4] California E. P. Co. v. F. P. C., No. 12387. No. 495, III R. 667. The opinion is reproduced, No. 205 Pet. Br. App. B, pp. 83-91.

miles to Mina; and thence 4 miles to Sodaville. The line from the Mill Creek plant as far as Sodaville is a 55,000 volt line but the portion from Mina to Sodaville is operated at 7200 volts. At each of the places in Nevada referred to above, stepdown transformer stations reduce the voltage to local distribution levels. Petitioner's sole source of supply of the energy required to carry its load is through purchase from respondent, California Electric Power Company, except as it may receive assistance in emergencies from Diesel generating units at the Naval Ammunition Depot at Hawthorne. All of the energy so purchased is resold, none being used by petitioner itself, except incidental transmission and transformer losses (about 25 percent) and energy used in the System's shop and office building (less than one-tenth of one per cent). Govt. R. 26; No. 495, I R. 231, *et seq.*, R. 295.

The Company's Attempted Increase Over Its Filed Rate. The respondent Company and its predecessor have been selling energy to Mineral County since 1936 under rate schedules filed with the Federal Power Commission pursuant to Section 205(d) of the Federal Power Act. No. 495, II R. 585-615. The last rate schedule filed by the Company was designated as its Rate Schedule FPC No. 15. It was made effective as of October 5, 1945, by Commission order. Govt. R. 26. In a statement which has not been questioned, the opinion of the Federal Commission pointed out that "No rate schedule setting forth new rates has been filed with us by [the Company] and Rate Schedule FPC No. 15 has never been cancelled in accordance with our rules." Govt. R. 27. On the other hand, so far as has appeared, the Company never filed a rate schedule for any of those sales with the California Commission and that Commission never asserted jurisdiction over the sales except as set forth in the July 3, 1951, order.[5]

[5] In its July 3, 1951, opinion the California Commission declared (Govt. R. 9): "Mineral County Power System and the Navy were served under special contract rates *differing from filed tariff rates* for a number of years." (Emphasis supplied.)

However, having obtained a general rate increase from the California Commission on July 1, 1948, effective August 1, 1948 (Govt. R. 9), the respondent Company on July 30, 1948, notified petitioner that the Company would apply the "P-3" schedule prescribed by the California Commission for "Resale Power" in billing petitioner, as of October 5, 1948. This represented a 43 percent increase over the rates petitioner had been paying, or approximately $1000 per month (Govt. R. 27). On October 15, 1948, the Company submitted the P-3 schedule to the Federal Commission for filing to supersede its Rate Schedule FPC No. 15.[6] After four successive requests from the Federal Commission that the Company submit the additional data which the Commission's rules require to be included in rate schedule filings, showing the support for proposed rate increases, the Company on March 22, 1949, advised the Commission that it would not "go ahead with these filings." Govt. R. 26-27.

Commission Proceedings. In August, 1949, the Federal Commission discovered after repeated inquiry that the Company had been charging the increased rate notwithstanding its failure to effectuate a filing thereof. Govt. R. 27. Promptly after such disclosure the Company, in August, 1949, asked the California Commission to declare applicable, or apply, its July 3, 1948, rate order to this sale, as well as the one to the Navy, in supplemental applications filed with that Commission (Govt. R. 27, 6, 2; R. 1-2).[7]

In December, after one hearing on the supplemental applications had been held by the California Commission,

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[6] Section 205(d) of the Power Act requires thirty days' notice of a change in a filed rate to be given by filing new schedules with the Commission, "[u]nless the Commission otherwise orders."

[7] The Company's response to the Federal Commission's inquiries had also disclosed that it regarded its sale to the Navy as presenting a somewhat similar problem (No. 495, II R. 565) although that rate had never been filed with the Federal Power Commission or, apparently, treated by either the Company or the State Commission as subject to state regulation.

Mineral County complained to the Federal Commission that it had been overcharged and that the overcharge was continuing. It sought refund of the excess and restoration of the schedule filed with the Federal Commission "until such time as permission to change this schedule has been authorized by the proper authority." No. 495, II R. 537-538.

After communications between the California Commission and the Federal Commission and notice to the Nevada Commission among others (No. 495, I R. 7-8, 10-12), the concurrent hearing referred to above was held on the jurisdictional issues raised by the Company's supplemental applications to the California Commission and by the Federal Power Commission's show cause order relating to the apparent violations of Sections 20 and 205(d) of the Power Act and Sections 35.20 and 35.3 of the Rules and Regulations thereunder (No. 495, I R. 1-10).

Mineral County appeared in the proceeding before the California Commission (Govt. R. 6) and before the Federal Power Commission (Govt. R. 24) and appeared and introduced evidence at the concurrent hearing (No. 495, I R. 149, 227-262, 326-327). It intervened in the proceeding in the Ninth Circuit on review of the Federal Commission's order (No. 495, III R. 657). It petitioned the California Commission for rehearing of that Commission's order of April 13, 1951 (R. 5-8), and after its petition was denied on July 31, 1951, it filed its petition in the Supreme Court of California for a writ of review.

Effect On Retail Customers. While petitioner has been engaged in the foregoing proceedings before the two Commissions and the courts on review, in San Francisco and Washington, D. C., it has continued for over four years since October 5, 1948, to pay respondent Company at rates greatly in excess of those fixed in the schedule on file with the Federal Power Commission. For the last year and a half, the Federal Commission's order directing adherence to the filed rate has been stayed by order of the Ninth Cir-

cuit which requires the Company to segregate the excess (No. 495, II R. 646-648). The cumulative total of all excesses since October 5, 1948, amounted to approximately $59,652.54, or 45 percent, as of October 24, 1952,[8] and continues to accrue at the rate of about $1700 per month. The $59,652.54 total amounts to more than $90 per retail customer.

Any recovery of such accumulated excesses from respondent Company would be credited to the "Light and Power Fund" in the county treasury. As of November 30, 1952, there was $63,487.48 in said fund, according to petitioner's records. When and if the fund exceeds $90,000 it will become mandatory upon the board of county commissioners under the terms of the Nevada statutes "to call a public hearing for the consideration of power rate reduction equitable with the operating revenue being received by the system."[9] Thus petitioner's customers stand to benefit from a recovery of excesses.

ARGUMENT

—For our argument we adopt and urge as our own the argument in petitioner's brief in No. 205, with and subject to the following supplementary discussion of the differences in Mineral County's position from that of the Navy, petitioner in No. 205.

(1) The California Commission, having admitted that the sale to Mineral County (Govt. R. 16-17; R. 23), unlike that to the Navy (No. 205 Br. in Opp. 16-17), is one in which Nevada as well as California is directly concerned, to defend its jurisdiction falls back on the claim that it is authorized under Section 20 of the Federal Power Act to regulate this sale, even if it is in interstate commerce, because both California and Nevada have provided commis-

[8] These figures have been obtained from the files of the Federal Power Commission.

[9] Nev. Stats. 1945, pp. 332-333.

sions qualified to enforce the requirements of Section 20 and they have not been shown unable to agree on the rates fixed by the California Commission (P. U. C. Br. in Opp. 14). The Company makes the same claim (Co. Br. in Opp. pp. 10-12).

But this claim errs in assuming that Section 20 authorizes regulation by a single state acting unilaterally, under the usual state regulatory statute, as contemplated by the preceding Section 19 for all cases except where the power enters interstate commerce. For Section 20 contains a substantive provision, not found in Section 19, that interstate rates and service "shall be reasonable, nondiscriminatory, and just * * * and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful"; Section 20 also provides that "whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission * * * to enforce the provisions of this section * * *."

Two things are plain, from this wording, as to the state action therein contemplated: (a) It is the service and rate standard of Section 20 which is to be "enforced"—not a state law standard as in Section 19—and enforced by a "commission or other authority" provided by a state for the purpose of enforcing that standard (and the rest of Section 20); (b) The enforcement of that standard must be the result of agreement upon that enforcement by "properly constituted authorities" of each of the states directly concerned.

Hence, irrespective of whether California has provided a commission qualified under Section 20 as thus understood, it is clear that Nevada has not done so, as shown in petitioner's brief in No. 205 (pp. 59-62) and as found

by the Federal Commission (Govt. R. 31). For if any one thing is clear it is that the Nevada Commission neither has nor claims any authority over California Electric Power Company's sale to Mineral County; and respondents' assertion of the Nevada Commission's authority over Mineral County's rates and operations (P. U. C. Br. in Opp., 12-14; Co. Br. in Opp. 3-4) should not be allowed to obscure that fact.

Moreover it necessarily follows from the fact that Nevada, at least, has not provided a commission or other authority qualified to enforce the requirements of Section 20 that the "States are unable to agree through their properly constituted authorities on * * * the rates or charges * * * " as the Federal Commission found in the passage referred to above. Mere absence of disagreement is not enough to preclude Federal Commission action. *Safe Harbor W. P. Corp.* v. *F. P. C.*, 179 F. 2d 179, 191-193 (C.A. 3), *certiorari denied*, 339 U. S. 957. Equally clearly, "agreement" by a state agency, such as the Nevada Public Service Commission in this case, which has been charged by the State of Nevada with no responsibility or authority of any kind whatever as to the regulation of the Company's rates here in question would be completely meaningless. It would have no more legal effect than "agreement" thereto by a state board of medical examiners. As the Third Circuit said in the first *Safe Harbor* case (124 F. 2d at p. 806): "It was the intention of Congress that there should be regulation and control of hydroelectrical energy and not that impotent public bodies would be set up by the states to go through the motions of regulation."

Thus, Section 20, by stipulating inability to agree among the state agencies as to the condition precedent to Federal Commission regulation, made plain that the state regulation intended was regulation by the states directly concerned as equals, not by one assuming the prerogative of regulation, and the other the role of petitioner or

protestant before it, as the California Commission would have it.

(2) Another difference is that petitioner, Mineral County, although a "municipality" within the Power Act's definition in Section 3(7), is squarely within the prior Commission and court decisions referred to in the brief of petitioner in No. 205 (pp. 29-30, 44-45), which involved sales to "municipalities." Consumers, who were to be protected from excessive charges by the Power Act, as by the Natural Gas Act[10] (*F.P.C. v. Interstate N. G. Co.*, 336 U. S. 577, 581), benefit, either as taxpayers or as rate payers, from federal regulation of wholesale rates charged a municipality, no less than customers of a private utility, which is regulated by a state commission. So also it is clear that interstate sales for resale to municipal as well as to private utilities were beyond the constitutional power of the states to regulate and within the gap intended to be filled by Congress.[11] And the substantial number of such rates on file with the Federal Commission (see No. 205 Pet's. Br., p. 31, n. 12) discloses the practical importance of not upsetting the long-continued construction of the Power Act as applying to them.

(3) It may also be noted that this sale is admitted more broadly (R. 25; Govt. R. 8; R. 20), than that to the Navy (Govt. R. 14-15) to be a sale for resale and the California Commission does not claim, as it does with respect to

[10] 52 Stat. 821, 15 U. S. C. 717, *et seq.*

[11] The municipality of Chanute, Kansas, was one of the "distributing companies," referred to by this Court, to which Kansas Natural Gas Company made the interstate wholesale sales which the Court held beyond the constitutional power of the states to regulate in *Kansas v. Central Trust Company*, 265 U. S. 298, No. 137 Oct. Term 1923, R. 14. That case, *sub nomine Missouri v. Kansas Gas Company*, and the later *P. U. C. v. Attleboro S. & E. Co.*, 273 U. S. 83, disclosed the extent of the gap in the constitutional power of the states to regulate gas and electric utilities which was one of the reasons for the enactment of the Power Act and the Natural Gas Act. *F. P. C. v. East Ohio Gas Co.*, 338 U. S. 464, 470-471.

the sale to the Navy (No. 205, P. U. C. Br. in Opp. 8), that its order does not amount to a fixing of the rate and so does not impose a burden on interstate commerce beyond the constitutional power of a state to impose. Thus, there can be no basis here for any claim like that made by the California Commission in No. 205 (No. 205 P. U. C. Br. in Opp., p. 15) that regulation of the sale was a power left by Part I to the State of California, as a power which it possessed in the silence of Congress.

CONCLUSION

For the reasons set forth in petitioner's brief in No. 205 as supplemented herein, it is respectfully submitted that the order of the Supreme Court of the State of California affirming the order of the California Commission should be reversed.

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Attorney for Mineral County

APPENDIX

Particularly pertinent provisions of the Nevada statutes are as follows:

CHAP. 45—*An Act to authorize the board of county commissioners of the county of Mineral, State of Nevada, to purchase, acquire and construct an electrical power and telephone line, extending from the Lundy generating plant of the Nevada-California power company situated in the county of Mono, State of California, to the town of Hawthorne, Nevada, and thence via Luning and Mina to the town of Simon in the county of Mineral, State of Nevada, and branches thereof; providing for the maintenance and operation of said line as a public utility; the issuance and sale of bonds therefor; the levy and collection of taxes for the payment of such bonds, and other matters relating thereto.*

[Approved March 4, 1921]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows: * * *

(Nev. Stats. 1921, p. 80)

Section 1. The county of Mineral, State of Nevada, acting by and through its board of county commissioners, is hereby authorized and empowered to purchase the electrical power and telephone lines now extending from the Lundy generating plant of the Nevada-California power company, situated near Lundy, in the county of Mono, State of California, to the town of Hawthorne, in the county of Mineral, State of Nevada, and known as the "Pacific Division" of the Nevada-California power company's system of light and power lines within the State of Nevada, and thereafter to maintain and operate the same as a public utility for the transmission, sale and distribution of electrical energy to consumers, and to construct, operate and maintain an extension of said line from the town of Hawthorne, via Luning and Mina, to the town of Simon in said Mineral County, with branch from Mina to Candelaria, and the same shall be known as the "Mineral County Power System." (Nev. Stats. 1923, p. 366)

Section 2. The board of county commissioners, hereinafter referred to as the "Board of Managers," or the "Board," shall have authority to enter into any and all necessary contracts with any person, firm or corporation, either within or without the State of Nevada, for the purchase of electric energy and current; or to purchase any existing light and power line or integral part thereof; or to purchase or construct any necessary telephone lines for use in connection with the Mineral County power system; fix rates or tolls thereon; make any and all rules and regulations necessary and proper for the management, operation and control thereof, and may construct and operate branches or distributing lines, and operate substantions, transformers and other electrical appliances under the conditions hereinafter provided; *provided, however,* that nothing herein contained referring to contracts shall be construed as in any way superseding or repealing the provisions of any of the statutes of this state requiring an advertisement for bids for the purchase of materials and supplies in excess of five hundred dollars, as now required by law, or to permit the board to enter into contracts extending beyond their term of office, save and except contracts for the purchase of power or the sale of power; *provided further,* that in emergency cases the board, by unanimous resolution and order to be entered upon their minutes and reciting such emergency, may direct the purchase of any necessary materials in excess of five hundred dollars value, required for immediate repair of said system, without advertising therefor; *provided also,* that all contracts entered into by said board of managers with consumers for power service upon an industrial or commercial basis shall specifically require an advance deposit to be made each month of not less than seventy-five per cent (75%) of the estimated cost of power to be used by said consumer during the ensuing month, and shall also require that such advance payment must be made and paid to the county treasurer on or before the tenth day of each month, or the service shall be discontinued; such estimate shall be made by the board upon the recommendation of the engineer or general manager of the system, and be based upon the amount of installed and connected motor equipment and hours of use of said consumer (Nev. Stats. 1925, pp. 55-56)

Section 3. (a) This act contemplates primarily the purchase, distribution and sale of electrical energy by the Mineral County power system as a public utility in the towns of Luckyboy, Hawthorne, Luning, Mina, Candelaria, and Simon, over its lines, and the board of county commissioners are hereby authorized and empowered to maintain and operate said electric lines as a high tension electric power system, and purchase all necessary materials and supplies for use thereon or in connection therewith, and to operate transformers, substations and distributing systems at those points, or at other points to which the system lines may be hereafter extended, but nothing herein shall be construed so as to require or compel said board to maintain and operate said system at any of said points if, in the judgment of said board, as recorded in their minutes, it shall appear that so to do would be uneconomical and likely to result in an operating loss. (Nev. Stats. 1925, p. 56)

Section 15. (a) The county treasurer is hereby made ex officio treasurer of the said utility, without additional compensation, and shall be liable upon his official bond for the safe-keeping of all moneys which shall come into his hands, possession or control, under the provisions of this act, and for the faithful discharge of his duties hereunder; all moneys due to said utility shall be paid to said treasurer, who shall issue his receipt in quadruplicate therefor, one copy to be given to the person making payment, one copy to be filed with the county auditor; one copy with the general manager of the said system for his office files, and one copy to be retained by said treasurer in his office.

(b) The county auditor is hereby made ex officio auditor of the said utility without additional compensation, and shall be liable on his official bond for the faithful discharge of his duties hereunder, or such additional duties as may be imposed upon him by the board of county commissioners; all bills against such utility shall, after their approval and allowance by the board of county commissioners, be audited and allowed by said auditor in the same manner as other claims against the county.

(c) The county clerk is hereby made ex officio clerk of said utility, without additional compensation, and shall be liable upon his official bond for the faithful discharge of his duties hereunder, or such additional duties as may be

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IN THE

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No. 206

THE COUNTY OF MINERAL, State of Nevada, a Political Subdivision of the State of Nevada,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY, a corporation,

Respondents.

BRIEF OF CALIFORNIA ELECTRIC POWER COMPANY IN OPPOSITION TO THE WRIT.

Statement of Facts.

California Electric Power Company (Company) is a public utility electrical corporation generating, transmitting and distributing electric energy in the State of California and also a public utility engaged in the transmission and distribution of electric energy in Nye and Esmeralda Counties, Nevada which latter business and the lines used therefor, are distinct from the delivery of electric energy to the County of Mineral in California for sale and distribution in Mineral County, Nevada.

Company is a licensee under Part I of Federal Power Act (Act)[1] holding licenses for seven hydro electric power plants in Mono and Inyo Counties, California. At one of these plants (Mill Creek), Company delivers energy to Mineral County, and Mineral County transmits the same over its own transmission line into Nevada.

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[1] 49 Stat. 863; 16 U. S. C. 791 *et seq.*

The last contract existing between Company and Mineral County for such service expired October 5, 1948. Thereafter, Company asserted charges under its P-3 Schedule which had been approved by California Public Utilities Commission applicable to like business throughout Company's California system.

I.

The Sale by Company to Mineral County Is Not a Sale in Interstate Commerce.

All of the electric energy involved herein is, so far as generation and transmission by Company are concerned, strictly California intrastate energy. It is delivered to Mineral County at Mill Creek, California, and does not become interstate energy unless the transmission by Mineral County from California into Nevada makes it interstate commerce.

Section 201(f) of the Act provides:

> "No provision of this Part shall apply to, or be deemed to include, the United States, a state or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing," etc.

Mineral County is a political subdivision of the State of Nevada. Hence, the definition of interstate commerce in Section 201(c) to the effect that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed outside thereof" does not apply to Mineral County which transmits the energy from California into Nevada.

Mineral County is simply a customer of Company's Mono County, California, distribution system serving other customers at and around the Mill Creek Plant.

II.

Counsel for Mineral County Has No Authority to Renounce Jurisdiction of the Public Service Commission of Nevada or to Surrender the Contracting Autonomy of Mineral County to Federal Power Commission.

Even a resolution of the Board of Managers of Mineral County Power System could not operate to cast off the jurisdiction of Nevada Public Service Commission or to surrender the contracting autonomy of said county into the hands of a federal agency contrary to state laws. The presumption that an attorney has authority to represent his client could rise no higher.

In this case, counsel for Petitioner finds it necessary or convenient, in presenting the Petition herein, to renounce (p. 8) the jurisdiction of Nevada Public Service Commission over the rates of Mineral County in disregard of the provisions of state law to the contrary. He cites in the Appendix to his brief Section 2 as amended, Statutes 1925, page 55, but omits the critical provisions of Section 16 as amended, Statutes 1925, page 59, as follows:

> "Sec. 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers and rates charged to consumers for sale and distribution of electrical energy and current, and the tolls for telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of Nevada Public Service Commission, who may revise, raise or lower the same.*" * * * (emphasis added.)

Section 20 of the Federal Power Act requires of Nevada only a Commission "to enforce the requirements of

this section *within such State,*" and Nevada Public Service Commission is the usual and ordinary type of regulatory commission, with full power over the rates of Mineral County as contemplated by Section 20.

The act reflects a purpose of Congress to avoid a conflict of federal and state sovereignties, Federal Power Commission being an agency of the one and Mineral County of the other. Mineral County as a subdivision of the state has a contracting authority and autonomy of its own, deriving from the sovereignty of the State of Nevada, which ought not to be displaced or subordinated to the jurisdiction of a federal regulatory agency, Federal Power Commission, unless the intent of Congress to that end is abundantly clear.

Public Service Commission of Nevada has shown no purpose or desire to surrender its authority to the federal agency and the anxiety of counsel to do so on behalf of Mineral County is scarcely understandable and in excess of his authority under the Statutes of Nevada.

III.

Company's Sale to Mineral County Is Not a Sale at Wholesale, That Is, "To Any Person for Resale" and Hence Is Not Subject to the Jurisdiction of Federal Power Commission.

It is admitted by Petitioner that Company's sale to Mineral County is not subject to Federal Power Commission's jurisdiction unless it is a sale at wholesale, that is, "for resale."[2]

It is also admitted that, under the literal terms of the act[3] Mineral County is not a person, and sale to it is not

[2]Act, Sec. 201(b) and (d).
[3]Sec. 3(3), (4), (7); Sec. 201(d).

a sale of electric energy "to any person," so as to come under Federal Power Commission jurisdiction.

It has been contended by Federal Power Commission that, generally throughout the act, the term "person" does not include the United States, its departments or agencies, and this would seem to be equally applicable to a state and its political subdivisions and agencies. In a brief filed by Federal Power Commission in August, 1951, in the United States Court of Appeals for the 4th Circuit in Nos. 6273 and 6274, *United States ex rel. Chapman v. Federal Power Com. and Virginia E. & P. Co.* (later decided 191 F. 2d 796, cert. granted 72 S. Ct. 1034) this point was demonstrated in language so convincing that we quote and adopt it as our own.

> "'Person' is limited in Sec. 3(4) to mean 'an dividual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.
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> "Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act, the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise; the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T.V.A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would apply to the Secretary of the Interior, T. V. A. and other Federal agencies; and the Commission could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314(b), and request penalty fines against the United States under Sec. 316.

imposed upon him by the board of county commissioners; the clerk shall require all claims against such utility to be made and presented in duplicate, the original, after action thereon by the board of county commissioners, to be filed with the county auditor, and the duplicate retained in the office files of said power system.

(d) The sheriff of Mineral County and his deputies shall, without additional compensation, perform such duties in connection with the operation of such utility as may be required of him or them by the board of county commissioners, and they shall be liable upon their official bond for the faithful discharge of such duties.

(e) The district attorney shall, without additional compensation, act as attorney and counselor for said utility, and perform such duties as attorney and counselor thereof as may be required of him by the board of county commissioners; *provided*, he shall be allowed his necessary expenses incurred when required by said board to attend to matters connected with said utility away from his office, and such expenses shall be charged against said utility, and be audited, allowed and paid as are other claims against the county. He shall be liable upon his official bond for the faithful discharge of his duties hereunder.

(f) The board of county commissioners are hereby made an ex officio board of managers of said utility, without additional compensation, unless otherwise provided by law, and they shall cause to be kept all necessary records and books thereof. The record of proceedings of the said board of managers shall be kept separate and apart from the minutes of the board of county commissioners in volumes to be provided for the purpose, and all matters relating to such utility which shall come before said board for consideration and action shall be recorded therein, including claims approved for payment, and to which records a proper index shall be maintained. The board shall cause to be transcribed from the minutes of the board of county commissioners, all matters and proceedings relating to such utility from the date of its inception that there may exist a separate and consecutive record of all acts and proceedings affecting such utility, which record shall remain in the office of the county clerk; *provided, however*, all claims against such utility approved for payment by the

general manager thereof shall be finally acted upon and be subject to allowance or rejection by the board of county commissioners, and be audited by the county auditor as all other claims against such county. (Nev. Stats. 1925, pp. 58-59)

Section 16. The maintenance and operation of said Mineral County power system shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and distribution of electrical energy and current, and the tolls for telephone service, with the terms and conditions thereof, shall be fixed by said board, subject to the supervision of the Nevada public service commission, who may revise, raise or lower the same. * * * (Nev. Stats. 1925, pp. 59-60)

* * *

Section 19. All revenues derived from the operation of such system and not including taxes shall be paid to the treasurer of Mineral County, who shall place them in the "Light and Power Fund," hereby created in the county treasury, and such fund shall be set aside and used exclusively for the maintenance and operation of the Mineral County power system. The board of county commissioners shall also, monthly, set aside such portion, being not less than ten percent (10%) of the net operating revenues of the system, together with eighty percent (80%) of the accumulated revenue of the system at the time of the passage and approval of this amendment, to establish a fund of not less than $75,000 to be used exclusively for repairs, replacement, and depreciation of the system, and said fund of $75,000 shall be maintained in the manner above described.

All monies in the said light and power fund remaining over and above the amounts required to be set aside as aforesaid, not exceeding $15,000, shall be used as a revolving fund for the maintenance, operation, and expansion of the Mineral County power system. Whenever such fund reaches the amount of $15,000, accruing from revenues of the system, it will become mandatory upon the board of county commissioners to call a public hearing for the consideration of power rates reduction equitable with the operating revenue being received by the system. (Nev. Stats. 1945, pp. 332-333)